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Nos. 98-405 and 98-406

In the Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL, APPELLANT

v.

BOSSIER PARISH SCHOOL BOARD

GEORGE PRICE, ET AL., APPELLANTS

v.

BOSSIER PARISH SCHOOL BOARD

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF ON REARGUMENT FOR THE FEDERAL APPELLANT

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No. 98-405

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v.

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1. *The Proper Scope of Section 5*

a. Appellee contends (Bd. Br. 1-4)[1] that the purpose prong of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, bars only new voting practices with the purpose to worsen the electoral position of minorities, and that this limitation is found in the statutory term "abridge." Contary to appellee's contention (Bd. Br. 9), however, this Court has never held that "abridge" in Section 5 refers only to retrogression. As we have pointed out (Gov't Rearg. Br. 3-4), such a construction would be untenable, for Sections 2(a) and 3(c) of the Act also use "abridge," see 42 U.S.C. 1973(a), 1973a(c), and yet those provisions are not limited to prohib-

[1] In this brief, "Bd. Br." refers to appellee's principal brief filed on reargument; "Gov't Rearg. Br." refers to the government's principal brief filed on reargument; and "Gov't Opening Br." refers to the government's original brief on the merits filed in March 1999.

iting retrogression. Further, Section 5 was phrased to echo the Fifteenth Amendment, which provides that the right to vote "shall not be denied or abridged" on account of race, U.S. Const. Amend. XV, § 1, but it could not be seriously maintained that the Fifteenth Amendment prohibits only retrogressive practices.[2]

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[2] To avoid the problem that "abridge" in the Fifteenth Amendment is not limited to retrogression, appellee suggests that "abridge" as used in the Amendment necessarily requires another kind of comparison, namely, a comparison of a racially discriminatory voting practice to a specific, hypothetical state of enhanced minority voting strength (Bd. Br. 4). That argument is incorrect. Although the specific concept of *vote dilution* requires comparison to an undiluted state, see *Holder* v. *Hall*, 512 U.S. 874, 880 (1994) (opinion of Kennedy, J.), it is quite possible to find an unconstitutional impairment of voting rights on account of race without pointing to a specific, alternative, nondiscriminatory state. For example, if a State were to create a new political entity with boundaries similar to those in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), those boundaries would demonstrate the existence of a racially discriminatory purpose, even if it was not certain what lines the State would have drawn if it had acted without a discriminatory purpose.

Under *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the relative impact of any decision on minority and white voters is an "important starting point" for determining the existence of discriminatory intent, *id.* at 266-267, but it is not the entirety of the analysis, and *Arlington Heights* does not require a comparison with an ideal, nondiscriminatory state as a predicate to a finding of discriminatory intent. Of course, the presence of a readily apparent nondiscriminatory alternative might be important evidence that the State had engaged in racial discrimination, but it is the infection of the jurisdiction's decisionmaking by a racially discriminatory purpose, rather than a contrast with an ideal state, that supplies the constitutional violation. Indeed, it is well established that an unconstitutional impairment of the right to vote on account of race may be found even when it would be permissible for the jurisdiction to accomplish precisely the same result for racially neutral reasons. See Gov't Rearg. Br. 8. Conversely, discriminatory intent is not established by the mere fact that a voting plan has a relatively adverse impact on minorities (much less by the fact that the plan fails to maximize the voting strength of minorities). There may be many nondiscriminatory reasons why a jurisdiction might fail to adopt a voting practice that would enhance minority voting strength. The jurisdiction might be pursuing traditional, nondiscriminatory priorities, or the possibility for minority enhancement might not be readily apparent because minority citizens might not draw attention to it. Appellee therefore seriously errs in arguing (Bd. Br. 11) that effect counts for everything, and purpose for little if anything, in voting rights.

Appellee also suggests (Bd. Br. 4-6) that Section 5 could not have been intended to prevent the perpetuation of unconstitutional discrimination because it is reactive to changes proposed by a covered jurisdiction. Appellee reasons that, if preclearance were denied on the ground that the new voting practice would perpetuate discrimination, the denial would simply leave the prior discrimination in place. That argument ignores the reality of most changes to election laws, which are set in motion by a need to address some change in circumstances. Redistricting (as in this case) provides a useful example. Appellee was under a constitutional obligation to redistrict because its 1980s plan was malapportioned. Section 5 prevented it from adopting a plan with a racially discriminatory purpose. The constitutional imperative of reapportionment, however, prevented it from doing nothing.[3]

b. Appellee's effort to distance Section 5 from the Constitution leads it to decidedly odd assertions about the function

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[3] In many situations, a covered jurisdiction may be determined or may find itself compelled to change its voting practices because of some new priority or objective, or some change in circumstances. In *Lopez* v. *Monterey County*, 119 S. Ct. 693 (1999), for example, the changes in Monterey County's system of electing judges requiring preclearance were undertaken pursuant to a statewide policy of court consolidation. The option of remaining in place, *i.e.*, retaining a bifurcated court system, was neither realistic nor desired by either the State or the County. Section 5, however, was enacted to ensure that the consolidation (and similar changes to election laws) could not be used to further discrimination.

that Congress intended for the preclearance remedy. Appellee suggests (Bd. Br. 7) that Congress intended the elimination of discrimination to be accomplished entirely by the suspension of tests and devices in Section 4 of the Act, 42 U.S.C. 1973b, and designed Section 5 preclearance merely as a backstop against any retrogression from the new and improved, nondiscriminatory state. That argument is misconceived. As we have explained (Gov't Rearg. Br. 10-13), Congress has always understood Section 5 as preventing both retrogression and conscious attempts to perpetuate discrimination by new means. Thus, when Congress reenacted Section 5 in 1970, it was well aware that Section 4 had not by itself eliminated all racially discriminatory infringements of the right to vote, and the House Judiciary Committee stated that extension of Section 5 was "essential" both to safeguard gains achieved and "to prevent future infringements of voting rights based on race or color." H.R. Rep. No. 397, 91st Cong., 1st Sess. 5 (1969); see also *City of Rome* v. *United States*, 446 U.S. 156, 182 (1980).

Appellee further argues (Bd. Br. 12 n.6) that, although there were jurisdictions that had successfully prevented *any* black citizens from registering or voting in their elections before Section 5 was enacted, it would nonetheless have been theoretically possible for those jurisdictions to bring about retrogression. According to appellee, in sum, no matter how bad things were in 1965, they could always have been worse. But even if we assume *arguendo* that a jurisdiction that had for years successfully prevented a single black citizen from registering to vote might somehow have brought about a further erosion of blacks' right to vote, it is scarcely conceivable that Congress intended Section 5 to have only the minuscule function of barring such "retrogression." By that hypothesis, Section 5 would have been least significant in the jurisdictions with the worst history of official racial discrimination in voting.

c. Appellee also strains to avoid the import of this Court's precedents. Concerning *City of Pleasant Grove* v. *United States*, 479 U.S. 462 (1987), appellee speculates that Pleasant Grove's annexation of an all-white enclave might have been intended to cause retrogression because, appellee asserts (Bd. Br. 20), Pleasant Grove had 32 black residents. But every Justice on this Court, as well as the district court, decided *Pleasant Grove* on the assumption that the town was all-white at the time of the annexation, and that assumption was shared by the parties litigating the case. See 479 U.S. at 465 n.2 (opinion of the Court); *id.* at 475 (Powell, J., dissenting); *City of Pleasant Grove* v. *United States*, 568 F. Supp. 1455, 1456 n.3 (D.D.C. 1983). Pleasant Grove's officials had been unaware of the presence of any black residents of the town, see 479 U.S. at 465 n.2, and so they could not have acted with the purpose to worsen the existing voting strength of those residents. The officials' objective was to maintain the status quo. See *id.* at 472.[4]

Appellee also misapprehends the holding of *City of Richmond* v. *United States*, 422 U.S. 358 (1975). Appellee observes (Bd. Br. 10-11) that the alleged discriminatory purpose behind the annexation at issue in that case was a purpose to reduce the voting strength of blacks in Richmond from its pre-annexation level; indeed, the Court held that, if the annexation was in fact designed for that purpose, then it should be denied preclearance—even though the very same reduction in the voting strength of blacks in Richmond was permissible under Section 5's effect prong, as applied in the annexation context. See 422 U.S. at 378. That holding of *City of Richmond*, however, conclusively demonstrates that appellee's reading of Section 5 is wrong. If appellee were

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[4] See also Gov't Opening Br. 27-28 (explaining that *Busbee* v. *Smith*, 549 F. Supp. 494 (D.D.C. 1982), aff'd mem., 459 U.S. 1166 (1983), involved redistricting where retrogression was neither caused nor intended).

correct that the purpose and effect prongs of Section 5 must be coterminous, then *City of Richmond* could not have been correctly decided. That case stands for the proposition that a jurisdiction's "purpose" to achieve a particular outcome (there, a particular reduction in minority voting strength) may require denial of preclearance under the purpose prong, even when nonpurposeful official action with exactly the same "effect" does not require denial of preclearance under the effect prong. Thus, while appellee argues that, "[i]f the result is legitimate, it is difficult to understand why it becomes illegitimate simply because it is intended," Bd. Br. 12, the Court rejected that very position when it explained in *City of Richmond* that "it could be forbidden by § 5 to have the purpose and intent of achieving only what is a perfectly legal result under that section." 422 U.S. at 378.[5]

d. Appellee persistently accuses the Department of Justice of pursuing a "maximization" policy requiring covered jurisdictions to create as many majority-black districts as possible.[6] This case, however, has nothing to do with maximization. When the Department interposed an objection to appellee's 1992 plan, it made clear that appellee was "not required by Section 5 to adopt any particular plan." J.S. App. 235a. The Department detected a discriminatory purpose in the plan, not just because it provided for *no* majority-black

[5] Appellee also relies (Bd. Br. 5) on *City of Lockhart* v. *United States*, 460 U.S. 125 (1983), for the proposition that Section 5 is concerned only with retrogression, but the Court in that case applied only the effect prong of Section 5, and not the purpose prong, see *id.* at 130 & n.4, and the Court's subsequent decision in *City of Pleasant Grove*, *supra*, made clear that the purpose prong reaches beyond a purpose to cause retrogression.

[6] Although little would be gained by recapitulating here the dispute in other cases and other records about whether the Department had engaged in such a maximization policy, we do note that this Court has made quite clear that such a policy could not be justified as a means to enforce Section 5. See *Miller* v. *Johnson*, 515 U.S. 900, 923-927 (1995).

districts (much less any "maximum" possible number), but also because appellee had manipulated the redistricting process to override the concerns of the black community, and had failed even to consider whether blacks would be represented fairly under the 1992 plan when (as appellee later stipulated) it was "obvious" that at least one reasonably compact, majority-black district could be drawn using traditional districting criteria. *Id.* at 154a-155a.

The Department of Justice analyzed appellee's plan under the purpose prong as it analyzes all voting changes submitted for preclearance, by applying the factors set forth in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-266 (1977). The "impact" of the plan is an "important starting point" for determining whether there is a constitutional violation, see *id.* at 266, but it is never the entirety of the purpose analysis, and in this case, other *Arlington Heights* factors are especially compelling, particularly the "sequence of events leading up to the challenged decision," see *id.* at 267. That sequence included appellee's sudden decision to sacrifice its traditional districting priorities, including incumbency protection, for a plan it had previously found ill-suited for school board elections, when it was presented with evidence that a majority-black district was feasible and desired by the black community.[7]

[7] Appellee also argues (Bd. Br. 13) that "[t]he *status quo* for any redistricting plan henceforth submitted for preclearance" is "necessarily nondiscriminatory" because the Department of Justice or the preclearance court has "affirmatively found" its redistricting plans to be nondiscriminatory. That argument is flawed in several respects. First, when the Attorney General declines to interpose an objection, she does not "affirmatively find" a plan to be nondiscriminatory. She may decline to object because the evidence submitted to her does not provide a basis for suspicion of discrimination, but that may be because relevant evidence is withheld. For that reason, and others, Section 5 permits the Attorney General to

e. In the end, appellee is reduced to making arguments against Section 5 itself. Appellee argues that local federal district courts hearing conventional constitutional challenges to voting practices are better suited than the preclearance district court in the District of Columbia to evaluate the issue of a covered jurisdiction's discriminatory intent (Bd. Br. 2, 14); that authority to evaluate new voting practices for their discriminatory purpose should not be lodged with the Attorney General at all (*id.* at 17); that, by requiring the covered jurisdiction to obtain preclearance before implementing a new voting practice, Section 5 effects an unprecedented intrusion on state sovereignty (*ibid.*); and that covered jurisdictions should not be "second-class citizens who must affirmatively disprove their guilt" (*id.* at 24). These were, of course, the arguments raised against Section 5 by its opponents in Congress, but they were rejected by Congress in 1965, 1970, 1975, and 1982. They were also raised against Section 5's constitutionality in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 334-335 (1966), and were rejected in that case.

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sue to enjoin a plan even if she has previously precleared it. See 42 U.S.C. 1973c.

In addition, even if a redistricting plan was adopted for nondiscriminatory reasons in 1970, 1980, or 1990, that does not mean that it is automatically nondiscriminatory to adopt a similar plan ten years later. Racial demographics in the jurisdiction may change significantly during the intervening ten years, and a jurisdiction intent on discrimination may find that minor modifications to existing district lines are sufficient to prevent any improvement in minority voting strength. In other situations, especially where the number of districts changes (for example, as a result of reapportionment following the decennial census), a jurisdiction may have ample opportunity to manipulate its boundary lines in order to prevent improvement in minority electoral opportunity, without causing retrogression. Appellee therefore errs in arguing (Bd. Br. 13-14) that, because of the anti-retrogression rule, it will be impossible for a jurisdiction to engage in intentional vote dilution after the 2000 Census.

Finally, it simply is not the case that, in 34 years of evaluating preclearance submissions for discriminatory intent, the preclearance court and the Attorney General have exercised a "standardless power" (Bd. Br. 17). Rather, the court and the Attorney General have evaluated discriminatory purpose under standards consistent with the *Arlington Heights* framework. In Section 5 declaratory judgment actions, the preclearance court has never limited its purpose analysis to a search for retrogressive purpose (other than in this case). The Attorney General's approach to the statute has been the same. See Gov't Rearg. Br. 13. Appellee has failed to show that this consistent approach over 34 years has rendered the statutory scheme unworkable or damaged the Nation's constitutional structure.

2. *Burden of Proof*

Appellee has made no argument based on the text or legislative history of Section 5 that the burden of proof on the question of purpose should rest with the government. Indeed, appellee acknowledges (Bd. Br. 24) that a covered jurisdiction has the burden of proof on the question of *retrogressive* purpose, as well as effect, and that the text of the statute requires that conclusion. But if we are correct that Section 5 forbids implementation of a new practice with a discriminatory but nonretrogressive purpose (as well as a retrogressive purpose), then it is impossible to read the statute as requiring the government to bear the burden of proof on the *nonretrogressive* purpose, while requiring the jurisdiction to prove the absence of a *retrogressive* purpose.

Appellee argues only (Bd. Br. 22-24) that, because the government previously assumed the burden to prove a "clear violation" of the "results" standard of Section 2 as a basis for denial of preclearance under Section 5, the government should be deemed to have assumed the burden of proof on the question of purpose as well. As we have explained

(Gov't Rearg. Br. 19 n.11), the government's assumption of the burden of proof on the Section 2 results issue was intertwined with its position that a clear violation of Section 2's results standard required denial of preclearance, which this Court held to be erroneous. That the government erred in one aspect of its construction of Section 5 once is hardly a basis for creating new error in the different context here. The government has always taken the position that the covered jurisdiction bears the burden of proof on purpose in Section 5 preclearance actions, and the Attorney General has consistently applied that burden of proof in administrative preclearance proceedings as well. See *Georgia* v. *United States*, 411 U.S. 526 (1973).[8] And although appellee suggests (Bd. Br. 25) that placing the burden of proof on the government is necessary to avoid constitutional doubts about Section 5, the Court long ago turned aside the argument that placement of the burden of proof on the covered jurisdictions creates any constitutional difficulty. See *South Carolina* v. *Katzenbach*, 383 U.S. at 335.

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For the foregoing reasons, as well as those set forth in our earlier briefs, the judgment of the district court should be reversed.

Respectfully submitted.

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[8] Contrary to appellee's suggestion (Bd. Br. 25), there is nothing absurd or impractical about placing the burden of proof on the covered jurisdiction to prove both a lawful purpose and a lawful effect in administrative proceedings. As we have explained (Gov't Rearg. Br. 14-25), a burden of proof is in effect a rule of decision governing the result when the decisionmaker is in doubt or the evidence is in equipoise. A decisionmaker may use such a rule of decision even when the proceedings are less formal and adversarial than judicial proceedings.

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AUGUST 1999

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